

Internal Revenue Service
memorandum

CC:TL-N-5811-88
Br4:RBWeinstock

date:

MAY 24 1988

to:

District Counsel, San Diego
Attn. Valerie Liu

from:

Director, Tax Litigation Division

subject:

This is in response to your request for technical advice dated April 28, 1988.

ISSUE

Whether the Service made a proper assessment of a deficiency from a defaulted statutory notice which included the fraud penalty when prior to assessment the Service mistakenly issued another statutory notice to the taxpayer for the same unreported wages asserting the negligence penalty (but not the fraud penalty). Taxpayer petitioned the second notice.

BACKGROUND

This case involves the sending of a second statutory notice to a taxpayer after the taxpayer had failed to file a timely petition from the first statutory notice. The second notice was issued approximately two weeks before assessment was made of the deficiency and additions to tax stated on the first notice. Both notices involved petitioner's [REDACTED] unreported wage income but computed the tax liability differently. The first notice, applying community property principles, split petitioner's income with his spouse and computed his tax on the basis of the married filed separate rates of I.R.C. § 1(d) with one personal exemption and no allowance for dependents. The first notice also included additions to tax under I.R.C. § 6653(b) and I.R.C. § 6654(a).

The second notice which was also based on petitioner's unreported wage income, computed his tax liability on the basis of all of the unreported wage income. The second notice used the tax rates applicable to unmarried individuals and allowed him one personal exemption and no allowance for dependents. This second also asserted additions to tax under I.R.C. §§ 6651(a), 6653(a) and 6654(a) but did not assert fraud under I.R.C. § 6653(b). Taxpayer filed a petition from this notice which raised only tax protest arguments.

Our office initially provided your office with informal technical advice in which we advised you that the second statutory notice was valid, and that the Tax Court had jurisdiction. We also advised your office that we believed that the

08502

assessment of the tax and additions to tax from the first notice was valid and should not be abated. In view of this assessment, and our agreement that the amount of tax asserted in the second notice in excess to that assessed was in error, our offices concluded that there was no deficiency and no additions for tax pursuant to I.R.C. §§ 6651(a), 6653(a) and 6654(a) and that summary disposition of this case was proper.

Pursuant to this informal advice, your office moved for summary judgment in which respondent conceded that only one-half of the wages should be included in petitioner's gross income and that the petitioner was entitled to his daughter as a dependent. We moved for summary judgment because there was no factual dispute as to petitioner's tax liability, or as to petitioner's liability under I.R.C § 6654(a), and that there was no deficiency in tax due from or overpayment due to the petitioner for [REDACTED] nor were there any additions to tax due from the petitioner pursuant to I.R.C. §§ 6651(a), 6653(a) and 6654(a).

On March 7, 1988, [REDACTED] rendered a bench opinion which sustained the determination of petitioner's tax liability as stated in our motion for summary judgment stating "We agree with Respondent that there is no material issue of fact in this case and, therefore, sustain Respondent's determination of tax on one half of the wages received by Petitioner as now involved after Respondent's concession." (Tr. p. 15). The Court also sustained Respondent's additions to tax and ordered that a decision be entered under Rule 155. We advised [REDACTED] off the record that we did not want the additions to tax because we had already assessed them based on the earlier statutory notice. Subsequent to the hearing, [REDACTED] contacted your office and advised that she felt that a correct Rule 155 computation should reflect abatement of the prior assessment for the section 6653(b) fraud penalty and reflect the inclusion of an addition to tax pursuant to I.R.C. § 6653(a), citing section 6215 for the proposition that the prior assessment should be abated.

ANALYSIS

As we orally advised you previously, the second statutory notice was a valid notice. We previously advised you that we believed the first assessment was a valid assessment. However, [REDACTED]'s oral opinion raises a number of questions which have led us to reconsider our previous advice. Her suggestion that Respondent file a Rule 155 decision document which reflects abatement of the assessed fraud penalty led you to request our views as to whether the Tax Court had to recognize our prior assessment.

We note that the section 6213(a) states in general that "no assessment of a deficiency in respect of any tax imposed by subtitle A ... shall be made until [the expiration of the time for filing a petition with the Tax Court] ..." Even if this restriction on assessment doesn't apply to a previously defaulted notice, the subsequent notice in this case involves the same operative facts (the petitioner's

unreported wages). We believe that the second notice might properly be treated as superseding the earlier notice, and therefore, is likely subject to the section 6213(a) restrictions. 1/ Based on this analysis, the assessment would appear to have been improper and should be abated.

██████████ stated that the Rule 155 decision should reflect abatement of the fraud penalty and did not indicate that the entire assessment should be abated. Nevertheless, we believe abatement of the entire assessment would be prudent, particularly insofar as petitioner is a tax protestor who will appeal the Tax Court's decision in this case. 2/ It is not in our interest to have the issue of whether the assessment was proper in front of the Ninth Circuit on appeal. Abatement of the assessment will remove that issue.

CONCLUSION

We believe that because assessment was made after the issuance of the second statutory notice, the section 6213(c) restrictions on assessment and collection of tax apply, and therefore, the assessment was improper. Therefore, the assessment should be abated. Insofar as the assessment is abated, your Rule 155 decision document should clearly indicate that pursuant to the Court's oral opinion, there is a deficiency

1/ Based on this discussion we do not need to consider whether section 6215(a) would restrict our collection of the assessed fraud penalty. Section 6215(a) provides in pertinent part that "[n]o part of the amount determined as a deficiency by the Secretary but disallowed as such by the decision of the Tax Court which has become final shall be assessed or be collected by levy or by proceeding in court with or without assessment." An argument might be made that because fraud was not an issue in the second notice, the Court did not disallow it. We have found no authority directly on point, although in another case involving two statutory notices, Bowman v. Commissioner, 17 T.C. 681 (1951), the Tax Court held that there were no additions to tax insofar as the Court found no deficiency.

2/ You forwarded copies of Rule 160 and 161 Motions filed by the taxpayer. Insofar as there has been no decision filed, the Rule 160 Motion to Vacate is premature. Both motions contain the same protest arguments the Court summarily rejected previously.

of tax and are additions to tax. Our advice is issued you within the time constraints necessitated by dealing with the Court. If you have any questions on the above or require further assistance, please contact Ronald Weinstock at (FTS) 566-3345.

MARLENE GROSS
Director

By:



Henry G. Salamy
Chief, Branch No. 4
Tax Litigation Division